Exploring Pawn and its Legal Practices in Indonesia: A Study of Challenges and Solution

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Exploring Pawn and its Legal Practices in Indonesia: A Study of Challenges and Solution

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Abstract

Pawnshops exist to provide loans based on lawful agreement in which the provided loans could bring a number of risks in loan return. Moreover, pawnshops are expected to be able to provide legal certainty to creditors on debt payment. Moreover, the implementation of this pawn system often faces problem in the valuable items secured as collateral in fiduciary agreement in which the debtor has a right over the collateral and the object used as collateral may rapidly move. This problem is deemed crucial for pawnshops as non-bank loan providers which give loans to societies, apart from unpaid debts. It demands thorough and analytical examination in order to be more accurate in determining the value of object secured as collateral, or pawnshops will keep facing such a serious problem in term of the status of collateral put for loans. Collateral-related problems are becoming more complicated, as these problems are not only included in civil law anymore, but they may also take criminal law. As a consequence, this collateral problem which is involved in civil code may no longer become a single case, as it is also taken as criminal conduct. This condition highly requires pawnshops to be more careful, thorough, and analytical in receiving collateral set as a security. Therefore, in line with the vast development of Indonesian economy, pawnshops whose rule is based on Dutch's legal system require legal certainty concerning pawn problems rising in its practices.

Keywords: Pawn, Legal Practice, Indonesia.

1. INTRODUCTION

As the economy of Indonesian growing, the necessity of the societies is also increasing, especially in terms of funding to help them with their daily need or running their business.The neccessity encourages people to propose loans which involves an organisation having right to hold valuable items secured as collateral. This organisation is commonly known as a pawnshop. The law that regulates pawn process stems from colonial law stated in Book II, Chapter XX Article 1150 – 1161 of Indonesian Civil Code. Borrowing money from a pawnshop is becoming a trend among people due to its simple and easy requirement of loan approval. However, the pawn implementation is still seen to face a number of challenges that require adjustment for a legal certainty. It is inevitable that legal problems in the pawn implementation in Indonesia not only deal with civil law, but the problems may involve criminal acts.

All the problems which rise in pawn implementation are related to movable object secured as a collateral. In general, movable object is defined as an item, property or asset which is easily moved or transferred. Such a typical characteristic of mobility often makes us difficult to trace down who is the valid owner of an object. This is in line with the principle of ownership of a movable object in article 1977 of Indonesian Civil Code called *Bezit*[1]. Therefore, the pawn implementation should not take the ownership of the object which is secured as collateral by the debtor as a problem. Article 1977 of Indonesian Civil Code is often responsible for the validity of the ownership of the object set as a collateral in pawnshop, just in case that the moving object is not lawfully owned by the debtor who puts it as a collateral.

Unlike the above perspective of law, according to criminal code, it is agreed that any party who possesses an object cannot be entirely be regarded as the valid owner of the object. It is written in article 480 of Criminal Code which assertively implies that all parties, due to carelessness, are prone to any criminal conducts related to inappropriate owner of the valuable object secured as collateral.

In other words, these two different principles of law in Indonesia raise some legal problems in pawn

implementation in Indonesia. It seems to be contradictory to the purpose of law, which aims at justly protecting the pawn doers. Therefore, the law is expected to be able to fairly protect all parties in pawn practices including the pawnshop, the debtor, or any third party involved in the pawn transaction.

According to the aforementioned, this research will describe, identify, and analyse pawn problems according to the perspective of law in Indonesia. As a consequence, this research uses juridical and empirical approach to reveal fact, find, and identify problems.[2]

This paper explains things related to the object secured as collateral according to the perspective of law in Indonesia. This paper will also identify and analyse legal problems in relation to pawn in Indonesia in both criminal and civil code. Then, solutions to and methods of how to tackle the problems will also be elaborated.

2. PAWN IN THE PERSPECTIVE OF LEGAL PRACTICE IN INDONESIA

Before problems related to pawn in the perspective of law in Indonesia are further explained, the regulations that control pawn in Indonesia will be first explained. The regulations of pawn are stated in Book II, Article 1150 – 1160 of Indonesian Civil Code. Another name of Civil Code is *Burgelijk Wetboek/BW*, the law left by the Dutch colonialists and is applied as a positive law in Indonesia according to Transitional provisions of 1945 Constitution of The Republic of Indonesia (UUD NRI 1945).

Etymologically, pawn is derived from Dutch language *pand* or pledge. According to Article 1150 of Indonesian Civil Code, A pawn is a right obtained by a creditor in a movable asset, which has been provided to him by the debtor or his representative, to secure a debt, and which entitles the creditor priority over the other creditors with regard to the settlement of the debt; with the exception of the costs incurred in the sale of the asset and the costs incurred, after the pledge, for the maintenance of the asset, which shall have priority. Salim H.S agrees that pawn is an agreement between a creditor and a debtor in which debtor gives a valuable thing secured as a collateral to the creditor for the loan granted just in case the debtor may forget to continue paying his/her loan.[3]

Pawn involves two parties: the one who gives and receives loan. A person who receives loan is considered as a legal subject who gives a valuable thing secured as a collateral to a party in a pawnshop as a part of a proposal to be granted with loan. However, the person in the pawnshop is seen as a legal subject who is authorised to bear the collateral as a part of the requirement for the debtor to get a loan from the pawnshop. The appointed pawnshops must be official pawnshops which receive collateral and give loan to debtors as regulated in government regulations Number 103 Year 2000 on pawnshops.

The valuable things secured as collateral are movable objects such as gold, cellphones, motorbikes, cars, and so forth, which are easily transferrable to pawnshops. Moreover, things included in intangible assets are debts, rights of earning money from an object or debt. According to the tangibility of things secured as a collateral in pawn, its collateral is then regulated by what is stated in Article 1977 Paragraph (1) Civil Code of Law: with regards to movable objects which do not comprise interest or debts which are not payable to bearer, the possession of such shall constitute absolute ownership. In other words, it is concluded that law protects whoever has the control of the asset no matter who officially has the ownership of the asset.

Movable object can be used as collateral in the pawn with the following requirements: the valuable things as the collateral must be given to the person in charge of the pawn in a pawnshop. This process must be based on written or oral agreement between two parties.[4] The agreement of the pawn is categorised as a supplementary agreement (*accesoir*), while the agreement that regulates money borrowing will be considered as the main agreement with movable objects as the collateral. The agreement on the collateral is made to bring the creditor to a better position or supreme position with some characteristics of preference that the payment of the loan to the creditor will be prioritised among other payments to other creditors[5]

The right of material security is the right which gives a creditor a better position because the creditor is prioritized and facilitated in taking out the settlement of the invoice and the particular object of the debtor is held by the creditor as the psychological pressure of the debtor to pay.[6] Therefore, it is expected that the creditor have a supreme or better or safer position than other concurrent creditors. When the debtor has stopped paying the loan given by a creditor, the creditor has a right to put the asset given as a collateral in a bidding process in order to pay back the loan which should be the responsibility of the debtor.

3. PAWN PROBLEMS IN THE PERSPECTIVE OF LEGAL PRACTICE IN INDONESIA

The existence of asset secured as collateral between the two parties functions as a reminder between the two parties. The practice of collateralpotentially triggers engagement of the two parties in civil law. In other words, pawn transaction is regulated in civil law. However, it is not limited to civil code which is usually related to the agreement made, but some problems that rise in pawn agreement may bring the practice of pawn to crime when there is a clash in either individual or common interest between two parties.

3.1 Pawn Problems according to Civil Law

Abuse of ownership of movable object secured as collateral can be one of several problems in pawn business. Such a problem can also ruin good faith among two parties and trigger civil conduct. Regulations that regulate who takes control the object put as collateral are in Article 529 Civil Code of Law which states that possession is interpreted as the holding or enjoyment of assets, which an individual, either in person or through another person, has within his power, as if he has actual title thereto. Moreover, movable objects are also stated in Article 1977 Paragraph (1) of Indonesian Civil Code. As a result, the creditor has a right to take the person who gives movable object for collateral as the owner of the object. Article 1977 Paragraph (1) in Indonesian Civil Code is mostly used as the basis of law for the party who receives the object secured as collateral.

As a matter of fact, in Indonesian Civil Code, the legal protection, as stated in Article 534, which is given to an individual who is in good faith possessing the object (Article 531) and an individual who is in bad faith possessing the object (Article 532) is considered equal in a way that whoever takes control the object should be considered as the owner of the object because what is essential to be understood is that honesty is attached to every individual. Dishonesty of a person that holds a position must be proven (Article 534 of Indonesian Civil Code). Therefore, when an individual possesses movable objects, no matter how he or she could possess them, he or she should be taken as the owner of the objects as long as there is no evidence that he or she is against the law when bearing the objects.

However, the Indonesian Civil Code sometimes goes the opposite and accidentally ruins the principle of good faith in the making of pawn agreement. The principle of good faith is stated in Article 1338 Paragraph (3) in Civil Code of Law: "They shall be executed in good faith". This line implies that either creditor or debtor who has been involved in an agreement should carry out the substance of the agreement according to good faith of each party.

In reality, submitting (*levering*) the objects for collateral can be done by any person other than the owner of the objects. This fact brings more possibility to criminal conducts. For example, a person is trusted to keep 100 grams of gold by his friend, then without prior notice, this trusted friend submits the gold to a pawn shop. This gold is then received by the pawnshop, as stated in Article 1977 in Indonesian Civil Code. In addition, an asset that is still held by a debtor despite its status as a collateral is usually taken back by pawnshop.

Another problem in pawn agreement is that the agreement is usually made orally. It is true that the agreement in civil code can be made either orally or in written form. Oral agreement is usually made among members of society done by an individual. Both the oral and written agreement give the same implication in which each party involved in the agreement is bound to related rights and obligations. Nevertheless, the legal force implied in oral agreement made among the members of society is seen weak and may be prone to problem when the substance of the agreement is not implemented. As a consequence, denial of the substance of agreement may be very common to happen among parties and it is quite possible that some members of society may not comply with the existing law.

The principle written in Article 1865 of Indonesian Civil Code implies that every individual who claims that he or she has a right, he or she should be able to prove his or her right. Furthermore, it is stated in Article 1866 of Indonesian Civil Code that the evidence should comprise written evidence, evidence presented by witnesses, inference, confession, and oath. In other words, oral agreement that should regulate loan given to debtor with an asset as collateral will face problem in bringing the evidence because the legal evidence of civil conduct will only be based on formal truth. Oral agreement has weak legal force and it will face dispute between parties.

3.2 Pawn Problems in Criminal Law

Apart from the civil conduct-related problem, pawn transaction may also leave a space for criminal problem. It starts from common assumption about civil law that may serve as basis in pawn transaction. One of basic assumptions of pawn transaction may be that whoever takes control movable object is seen as the owner of the object, as stated in Article 1977 Paragraph (1) of Indonesian Civil Code. This may turn into fatal assumption

in the context of criminal law because it is based on the awareness that good faith is an essential element in the possession of an asset as stated in Article 531 of Indonesian Civil Code.

When there is no good faith in the possession of an object, the trust given or right will be abused which is commonly known as embezzlement, or the object secured as collateral may be obtained in a way that is against the law. These two criminal conducts will be further explained in the following paragraph.

Embezzlement can occur when a debtor acts against the law by abusing the object of the third party that is legally held by the debtor, or this abuse can possibly be done by a creditor without a permission from the debtor when the object is secured as collateral, or when a debtor is neglectful so that the collateral is executed. It is because the lien is different from the rights of other forms of collateral. A lien only enables an individual to possess a thing secured as a collateral so that a creditor does not have any right to use, or earn money from the object secured as collateral.

Embezzlement is regulated in Article 372 of Criminal Code in which it is stated that embezzlement (*verduistering*) has a connotative meaning. The embezzlement is defined as an abuse of trust or right.[6] Juridically, according to what is stated in Article 372 of Criminal Code, embezzlement is an act that is intentionally done and is against the law by illegally claiming an object that is partially or entirely owned by somebody else but the object is under his or her possession not because of criminal conduct.

In criminal law, possessing or taking control (*zich toeeigenen*), according to Mvt, is defined as possessing or taking control an object as if he or she legally owned the asset. It can also be defined as doing something to the object as if he or she had a right to do so, and due to this act, the individual is against the law.[7] The act of *zich toeeigenen* involves selling, transferring, lending, using, pawning objects, or even letting somebody do something to the object without any approval from the person who legally owns the object.[8,9]

'The possession of objects not because of criminal conduct' is the main characteristic and it meets the case of embezzlement. In the criminal conduct of embezzlement, the possession of objects or assets must not be caused by any criminal conduct. The possession of objects occurs due to rental agreement, lending and borrowing agreement, purchase agreement, and so forth. When objects/assets are under a possession of a person not because of criminal conduct, but because of right conduct such as keeping the objects under an agreement, then the person trusted to keep the goods or assets acts against the law by trying to own the assets, this person is involved in embezzlement. Embezzlement possibly leads to another form of crime. According to jurisprudence of Supreme Court Number 103 K/Kr/1961, 21 November 1961, this crime, among other types of crime such as theft, embezzlement, and so forth, stands alone. This criminal conduct probably stems from obtaining an object by acting against the law, whether it is noticeable or not. When it is linked to embezzlement, those who receive an object secured as collateral or the third party who receives an object from the second party are prone to a criminal conduct. The law for this crime is assertively stated in Article 480 of Criminal Code in Paragraph (1): By a maximum imprisonment of four years or a maximum fine of sixty rupiahs shall be punished. Being guilty of receiving stolen property, any person who buys, hires, takes in exchange, takes as security, accepts as a gift, or in pursuit of gain, sells, hires out, disposes in exchange, gives as security, carries, keeps or hides an object of which he knows or reasonably should presume that it has been obtained through a crime.

According to what is stated in Article 480 (1), it is implied that whoever receives an object secured as collateral, where this object is obtained in the way that is against the law, he or she is involved in a criminal conduct, with the condition that the person who receives the object used as a security is aware or at least assumes that the object is obtained through crime. To know whether something should be 'assumed' as crime in this case, there should be some clues. Article 480 (1) encourages every individual to always be careful in receiving any objects from other parties, as there is always likelihood for crime to happen in giving and receiving an object.

4. SOLUTION TO THE PROBLEMS FACED IN PAWN IMPLEMENTATION IN INDONESIA

It can be concluded that almost all the problems existing in pawn transaction come from the possession of movable objects that are secured as collateral in pawnshops as stated in Article 1977 Paragraph (1) of Indonesian Civil Code. Article 1977 (1) of Indonesian Civil Code implies that the possession of objects or assets could constitute an ownership of those objects for the bearer. Therefore, what is implied in Article 1977 (1) should be linked to Article 1977 (2), Article 530 – 532 of Indonesian Civil Code, and other legal aspects as in Article 480 of Criminal Code. Those two types of law should go in line and should not be contradictory to each other. It is in line with the notion of Paul Scholten[1] which suggests that the Acts in civil code or criminal code should be interpreted by seeing how they are related to each other. Therefore, in terms of pawn, the person who receives an object secured as collateral must make sure that the person who submits the object secured as collateral is in a good faith.

As the society grows, it is advisable that legal certainty among problems in pawn implementation is needed through regulations which are expected to be able to give solutions to the existing problems. Here are some suggested alternative solutions to problems in pawn implementation:

a. The definition of good faith needed in pawn transaction should be made clear:
   1) The person who receives an object to be secured as collateral should hold the principle of carefulness, in which he or she should be able to precisely see whether the person who submits the object for security is really in a good faith, and the receiver should make sure that the object submitted is legally owned by the person who submits. This can be done by asking to see and examine the documents of the object/property or any written documents that show that the movable object or asset handed in to the pawnshop is legally owned by the person who submits the items.
   2) Pawn transaction should also be performed in simple, flexible, transparent, and accountable way, but it must still be carried out very carefully.

b. Oral agreement should not be used as the basis in pawn transaction because it is difficult to obtain evidence as problems occur. Oral agreement is not specifically regulated in Indonesian Civil Code or in any other Laws because this oral agreement is generally accepted in the Civil Code. Moreover, formal truth will be the only element that is responsible for the evidence needed, and this type of agreement is surely lack of legal certainty, leading to some more serious problems when a dispute takes place.

5. CONCLUSION

Based on all the aforementioned, it is concluded that:

a. Pawn transaction is a common transaction among people, especially those who expect a legal protection and legal certainty that cover all parties.
b. To guarantee all parties involved in pawn transaction, simple, flexible, transparent and accountable procedures in the transaction are required but the carefulness in carrying out this pawn process is still a priority.

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